

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AMANDA LYNN T.,

Plaintiff,

v.

Civil Action No.
6:19-CV-1046 (DEP)

ANDREW M. SAUL, Commissioner of the
Social Security Administration,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF:

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B. BROOKS BENSON, ESQ.

FOR DEFENDANT:

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REBECCA ESTELLE, ESQ.
Special Assistant U.S. Attorney

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

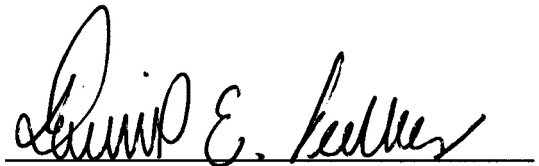
Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Acting Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on September 9, 2020, during a telephone conference, held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: September 10, 2020
Syracuse, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
AMANDA LYNN T.,

Plaintiff,

vs.

6:19-CV-1046

ANDREW M. SAUL, COMMISSIONER OF THE
SOCIAL SECURITY ADMINISTRATION,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on September 9, 2020, the
HONORABLE DAVID E. PEEBLES, United States Magistrate
Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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1 (The Court and all counsel present by
2 telephone.)

3 THE COURT: Let me begin by thanking both counsel
4 for excellent presentations, both in writing and verbally
5 today.

6 I have before me a challenge by the plaintiff to a
7 final determination of the Commissioner of Social Security
8 pursuant to 42 United States Code Sections 405(g) and
9 1383(c)(3).

10 The background is as follows: Plaintiff was born
11 in October of 1980, she is currently 39 years of age.
12 Plaintiff was 35 years old at the alleged onset of her
13 disability in September of 2016. At various points in the
14 record, plaintiff's height is measured at five foot
15 five-and-a-half inches up to five foot eight inches, and she
16 weighs anywhere between 180 and 369 pounds -- I'm sorry,
17 218 pounds. It was noted at page 369 of the administrative
18 transcript that she'd lost at one point 70 pounds, so her
19 weight has been variable. Plaintiff has a four-year college
20 degree. She holds a bachelor of arts in case management.
21 She also apparently was in special education when she was in
22 high school in the 11th grade, receiving additional
23 assistance for reading comprehension. Plaintiff is
24 right-handed. Plaintiff drives. She testified she cannot
25 use public transportation due to panic attacks. Plaintiff

1 was living with a boyfriend but in June of 2018, apparently
2 moved in with her family and now lives with her parents, a
3 grandfather, and a son. She also has joint custody of her
4 son who is nine years old. Although she now apparently has
5 sole custody because her ex-husband is in prison. Plaintiff
6 is not married. She stopped working in 2008, apparently when
7 she went to jail. Her prior positions include as a movie
8 cashier, a social agency caseworker, she worked at the
9 Upstate Cerebral Palsy Association where she was let go, she
10 worked as a waitress, and she worked as a certified nursing
11 assistant at the Masonic Nursing Home in Utica, New York.
12 She also tried volunteering in 2009 and 2010.

13 Plaintiff suffers from various physical impairments
14 including obesity, degenerative disk disease of the lumbar
15 spine, neuropathy. Her neuropathy affects her feet and
16 fingers as well as legs and arms. Plaintiff underwent EMG
17 and nerve conduction study on August 13, 2014. Results are
18 reported at pages 47 and 48 of the administrative transcript.
19 The testing revealed, evaluation of her right sural
20 antisensory nerve showed no response in the calf, all
21 remaining nerves were within normal limits. The impression
22 was listed as abnormal study. There is electrophysiologic
23 evidence for a peripheral neuropathy as can be seen with
24 toxic, metabolic, infectious, or inflammatory neuropathies.
25 Clinical correlation is advised. There is also magnetic

1 resonance imaging testing of plaintiff's lumbar spine in
2 December 2013. That is reported at page 470 of the
3 administrative transcript. The results showed moderate disk
4 dessication at L5-S1 and moderate central protrusion with
5 slight loss of disk height, mild-moderate central stenosis at
6 L4-L5. The plaintiff testified that her conditions, physical
7 conditions cause her to fall frequently, to suffer from
8 burning feet. A cane was prescribed for her on November 28,
9 2017 by Nurse Practitioner Donna Sergio, that appears at 523
10 of the administrative transcript. Plaintiff testified that
11 she uses it for balance.

12 Mentally plaintiff suffers from bipolar disorder,
13 poly-substance abuse, anxiety disorder. She testified that
14 she suffers from hallucinations, daily panic attacks, she
15 does have a history of suicide attempts. She was apparently
16 psychologically hospitalized in 2006 and 2008 but there don't
17 appear to be any records of those hospitalizations in the
18 administrative transcript. Plaintiff treated at Bassett
19 Health Care until September of 2016 where she saw Dr. Fatema
20 Islam, Dr. Emily DeSantis, Dr. Gregory Cummings, Dr. Ashly
21 Joseph, and Family Nurse Practitioner Kelsey Olmstead. Since
22 October of 2016 she has treated at the Falcon Clinic,
23 including with Dr. Richard Chmielewski and Nurse Practitioner
24 Donna Sergio, who has since apparently left that practice.
25 There she was treated primarily for her substance abuse with

1 Suboxone and Vivitrol or naltrexone. Plaintiff has also
2 treated with Dr. Islam Hassan, a neurologist, as well as
3 Dr. Jayaraju Raju, psychiatrist.

4 Plaintiff has been prescribed Ambien for sleep,
5 Flexeril, lithium, Risperdal, Topamax, Xanax, Wellbutrin, and
6 Klonopin. She also was on Ativan and Valium but those were
7 discontinued because of their addictive features. She was
8 also on Depakote, Prozac, and Effexor and briefly on
9 gabapentin, which she reported made her feel dizzy.

10 Plaintiff has a fairly wide range of activities of
11 daily living. She is able to shower, dress, prepare simple
12 meals, clean, do laundry. She does not shop. She does
13 engage in child care. She watches television, washes dishes.
14 She testified that her boyfriend shopped for her. She has no
15 hobbies and does not socialize. Plaintiff smokes
16 approximately five cigarettes per day and also smokes
17 marijuana.

18 Plaintiff has a history of drug abuse and opiate
19 addiction. She did serve one year of jail time for receipt
20 of stolen property, and there's some indication in the record
21 that she may also have received a conviction for driving
22 while intoxicated.

23 Procedurally, plaintiff had two prior applications
24 for Title II and Title XVI benefits denied. One on May 3,
25 2013 and one on March 16, 2015. Those appear at Exhibits 3A

1 and 4A of the administrative transcript. She later applied
2 again for Title XVI benefits on September 29, 2016, alleging
3 an onset date of September 26, 2016. At page 277, she
4 claimed disability based on neuropathy, bipolar disorder, and
5 anxiety. She later expanded that by reporting difficulties
6 in lifting, sitting, standing, walking, squatting, bending,
7 kneeling, climbing stairs, remembering, completing tasks,
8 concentrating, understanding, following instructions, and
9 getting along with others. That is reported at page 26 of
10 the administrative transcript citing Exhibit 4E.

11 The application was the subject of a hearing
12 conducted on July 12, 2018 by Administrative Law Judge Yvette
13 N. Diamond. ALJ Diamond issued a decision on August 23,
14 2018, finding that plaintiff was not disabled at the relevant
15 times and therefore ineligible for the benefits sought.
16 Social Security Administration Appeals Council denied review
17 of that decision, or specifically, plaintiff's request for
18 review on June 20, 2019, making the administrative law
19 judge's decision a final determination of the agency. This
20 action was commenced on August 22nd, 2019, and is timely.

21 In her decision, Administrative Law Judge Diamond
22 applied the familiar five-step sequential test for
23 determining disability.

24 At step one, she found that plaintiff had not
25 engaged in substantial gainful activity since September 29,

1 2016.

2 At step two, ALJ Diamond concluded that plaintiff
3 does suffer from severe impairments imposing more than
4 minimal limitations on her ability to perform work functions,
5 including obesity, neuropathy, degenerative disk disease of
6 the lumbar spine, bipolar disorder, poly-substance abuse, and
7 anxiety disorder.

8 At step three, ALJ Diamond concluded that
9 plaintiff's conditions do not meet or medically equal any of
10 the listed presumptively disabling conditions set forth in
11 the Commissioner's regulations, specifically considering
12 Listings 1.02, 1.04, 11.14, 12.04, and 12.06. The
13 administrative law judge also considered plaintiff's obesity
14 in accordance with Social Security Ruling, or SSR, 02-1p.

15 The administrative law judge next concluded that
16 plaintiff retains the residual functional capacity, or RFC,
17 to lift and to perform light work with both physical and/or
18 exertional and nonexertional limitations beyond full range of
19 light work. At page 25 to 26, and we'll come back to the
20 specifics, there are actually two residual functional
21 capacity findings, one predating September 28, 2017, and the
22 other covering the period from November 28, 2017 to the date
23 of decision. The only significant difference was the
24 required use of a cane for ambulation subsequent to
25 November 28, 2016.

1 Applying that residual functional capacity at step
2 four, ALJ Diamond concluded that plaintiff is unable to
3 perform her past relevant work which was characterized, with
4 the assistance of a vocational expert, as caseworker and CNA.

5 At step five, initially ALJ Diamond noted that if
6 plaintiff could perform a full range of light work, a finding
7 of no disability would be directed by Medical-Vocational
8 Guideline Rule 202.21, or the Grid rules, as we refer to
9 them. Based on the testimony of a vocational expert who
10 responded to a hypothetical that tracked the residual
11 functional capacity finding, the administrative law judge
12 concluded that, notwithstanding her impairments and resulting
13 limitations, plaintiff is capable of performing work that is
14 available in the national economy including as a routing
15 clerk, an office helper, and a copier.

16 The court's function, as you know, is to determine
17 whether substantial evidence supports the resulting
18 determination and correct legal principles were applied by
19 the administrative law judge. Substantial evidence standard
20 is deferential, it is as stringent or more stringent than the
21 clearly erroneous standard that we are familiar with as legal
22 practitioners. Substantial evidence of course is defined as
23 such relevant evidence as a reasonable mind might accept as
24 adequate to support a conclusion. The Second Circuit noted
25 the deferential nature of this standard in *Brault v. Social*

1 *Security Administration*, 683 F.3d 443 from 2012, and noted
2 that under the substantial evidence standard, once an
3 administrative law judge finds a fact, that fact can be
4 rejected only if a reasonable fact finder would have to
5 conclude otherwise.

6 The plaintiff in this case has raised three basic
7 contentions, some of which are interwoven. First, she
8 challenges the weight accorded to medical opinions of record,
9 including two treating sources or what plaintiff alleges are
10 treating sources, Dr. Chmielewski and Dr. Raju, as well as
11 Licensed Therapist Pope who of course is not an acceptable
12 medical source but nonetheless whose opinion must be
13 considered. The claim is that the failures to properly weigh
14 those opinions affects the step three determination as well
15 as the residual functional capacity finding. The second
16 concerns the weight accorded to plaintiff's subjective
17 complaints concerning her symptomology, and the third is that
18 the step five determination is infected by the errors cited
19 at points one and two.

20 I note as a backdrop that it is plaintiff's burden
21 through step four to establish her work-related limitations
22 under *Poupore*, Second Circuit's decision, and that includes
23 at the RFC stage. It is also her burden to show limitation
24 affects the ability to perform work functions.

25 First, one of the pivotal functions of the

1 administrative law judge is to determine the plaintiff's
2 residual functional capacity. An RFC represents finding of
3 the range of tasks that the plaintiff's capable of performing
4 notwithstanding her impairments at issue. An RFC is
5 determined, is formed by consideration of all relevant
6 medical and other evidence. To properly ascertain a
7 claimant's RFC, an ALJ must assess plaintiff's exertional
8 capabilities such as her ability to sit, stand, walk, lift,
9 carry, push, and pull. Nonexertional limitations or
10 impairments must also be considered, and of course any RFC
11 determination must be supported by substantial evidence.

12 Pivotal to the RFC determination in this case is
13 the weight given to plaintiff's treating sources. I note
14 that since the claim in this case was filed prior to
15 March 27, 2017, the former regulations, which have since been
16 abrogated and replaced, concerning treating source opinions
17 apply. Ordinarily the opinion under those regulations of a
18 treating physician regarding the nature and severity of an
19 impairment is entitled to considerable deference, provided
20 that it is supported by medically acceptable clinical and
21 laboratory diagnostic techniques and is not inconsistent with
22 other substantial evidence. Such opinions are not
23 controlling, however, if they are contrary to other
24 substantial evidence in the record, including the opinions of
25 other medical experts. Any conflicts of course must be

1 resolved by the Commissioner and the court is not permitted
2 to reweigh how those opinions, conflicting opinions are
3 weighed by the administrative law judge.

4 Significantly, if the administrative law judge does
5 not give controlling weight to a treating source's opinion,
6 she must apply several factors to determine what degree of
7 weight should be assigned to the opinion, including: One,
8 the length of the treatment relationship and frequency of
9 examination; two, the nature and extent of a treatment
10 relationship; three, the degree to which the medical source
11 has supported his or her opinion; four, the degree of
12 consistency between the opinion and the record as a whole;
13 five, whether the opinion is given by a specialist; and six,
14 other evidence which may be brought to the attention of the
15 administrative law judge.

16 In this case, since we're dealing with a Title XVI
17 application, 20 C.F.R. Section 416.927 of the former
18 regulations apply, although it is virtually identical to 20
19 C.F.R. Section 404.1527 which is cited by the administrative
20 law judge who claims that her treatment of the treating
21 source opinions was conducted pursuant to that regulation.

22 Significantly, when a treating source's opinions
23 are repudiated, the ALJ must provide reasons for the
24 rejection. In this case, the opinion given by Dr. Raju, who
25 undeniably is a treating source, appears at pages 524 to 530

1 of the administrative transcript. It was an opinion authored
2 on July 17, 2018. The first page of the opinion asks in
3 narrative form to address certain questions concerning
4 treatment and response and clinical findings, prognosis, and
5 so forth. The second page asks the treating source to
6 identify signs and symptoms, which Dr. Raju has done. On the
7 third page, page 526, Dr. Raju indicates plaintiff is unable
8 to meet competitive standards in the following areas: Work
9 in coordination with or proximity to others without being
10 unduly distracted; accept instructions and respond
11 appropriately to criticism from supervisors; get along with
12 coworkers or peers without unduly distracting and/or
13 exhibiting behavioral extremes; respond appropriately to
14 changes in a routine work setting; and deal with normal work
15 stress.

16 Dr. Raju also opines that in the area of complete a
17 normal workday and workweek without interruptions from
18 psychologically-based symptoms, plaintiff has "no useful
19 ability to function."

20 The opinion also goes on in the next page to
21 indicate that plaintiff cannot meet competitive standards in
22 dealing with stress in semi-skilled and skilled work, cannot
23 meet competitive standards and interact appropriately with
24 the general public, maintain socially-appropriate behavior,
25 adhere to basic standards of neatness and cleanliness, travel

1 in an unfamiliar place and use public transportation. On
2 page 528, it shows an extreme limitation in interacting with
3 others, adapting to the workplace, and managing oneself in
4 the workplace and marked limitations in concentrating,
5 persistence, and maintaining pace.

6 Finally, at page 529, Dr. Raju opines that
7 plaintiff would be absent more than four days per month and
8 off task 25 percent or more. Obviously that would be -- if
9 those opinions were adopted, plaintiff would be found
10 disabled and would be unemployable and probably would be
11 bound to meet or equal Listings, at least the 12.04, 12.06
12 listings at step three.

13 The administrative law judge rejected Dr. Raju's
14 opinions at page 29 very succinctly as follows: "I assign
15 limited weight to the opinions provided by treating
16 physicians." The administrative law judge treated
17 Dr. Chmielewski as a treating physician and also Dr. Raju and
18 stated in the instant case those statements generally failed
19 to identify specific relevant clinical data in support of
20 relatively severe restrictions identified. The opinion
21 contains literally no discussion of the *Burgess* factors and
22 I've read the decision as a whole, as I must. I know that
23 the Second Circuit has said in *Estrella v. Berryhill*, 925
24 F.3d 90, 2019, that the failure to specifically address the
25 regulatory or *Burgess* factors is not fatal if, when reading

1 the decision as a whole, the court is confident that the
2 treating source rule has not been violated. I am unconvinced
3 that that is the case here. Rather than stating her opinion
4 as to why the treatment records of Dr. Raju do not support
5 his findings, she rejects them because the doctor did not
6 specifically cite the supporting treatment notes. That
7 doesn't comport with my understanding of the treating source
8 rule.

9 The Commissioner has done a remarkable job in his
10 brief of going through an analysis of how the treatment
11 records and other data might not support Dr. Raju's opinions,
12 but that is post hoc rationalization, and what the court
13 needs to look to is whether or not the administrative law
14 judge made that analysis and in this case, she did not. Her
15 analysis is woefully deficient.

16 And I do know that the check-box forms have been
17 regarded by the Second Circuit in other courts as somewhat
18 weak evidence, but Dr. Raju's opinion goes further and asks
19 for signs and symptoms and it asks for narrative concerning,
20 as I indicated, treatment and so forth.

21 The -- and I agree with the plaintiff, plaintiff's
22 counsel that this is a mental health case and in mental
23 health cases, there's not always supporting objective
24 evidence and very often an expert like Dr. Raju, who's a
25 psychiatrist, must rely on, to some degree, his assessment of

1 plaintiff's reports of her symptomology. Unfortunately, had
2 Dr. Raju's opinion been accepted as a, given controlling
3 weight, it is likely that one or more of the listings would
4 have been found to have been met, but in any event, the
5 residual functional capacity would have been much more
6 limited than that that was established by the administrative
7 law judge.

8 I do note that Dr. Chmielewski, his opinions are
9 generally supportive of those of Dr. Raju. He gave an
10 opinion on February 24, 2018 and at page 35 which was the --
11 page 4 of the report that otherwise appears at 545 to 548, he
12 opined also that plaintiff would be absent more than four
13 days per month and would be off task 20 percent which is,
14 according to the vocational expert, would make plaintiff
15 unemployable. It is unclear whether Dr. Chmielewski is truly
16 a treating source. The clinic that he oversees was treating
17 the plaintiff extensively but primarily for her drug
18 addiction. I do note that the administrative law judge, as I
19 said before, treated him as a treating source but even if
20 he's not a treating source, his opinion should have been
21 considered, and it is consistent with the opinion of
22 Dr. Raju. Plaintiff treated with the clinic 14 times between
23 October 24, 2016 and March 12, 2018, presumably
24 Dr. Chmielewski had those records available to him.

25 I also note that Dr. Santoro, the consultative

1 examiner whose report appears at 369 to 373, opined that
2 plaintiff had significant limitations maintaining a regular
3 schedule and it was not even modest to marked. It is stated
4 marked limitations are noted in maintaining regular schedule,
5 totally consistent with Dr. Raju and Dr. Chmielewski.
6 Nowhere in the -- that I could find in the administrative law
7 judge's discussion of Dr. Santoro's opinion is her
8 explanation of why she rejected that particular limitation.

9 I know that plaintiff has also raised what used to
10 be called credibility, raised an issue concerning the
11 administrative law judge's consideration of plaintiff's
12 reported symptomology. Those of course are subject to
13 scrutiny under SSR 16-3p, and the administrative law judge
14 must take into account under that provision and the
15 regulations and specifically 20 C.F.R. Section 416.929(a),
16 plaintiff's subjective complaints in rendering a five-step
17 disability analysis. When examining the issue, however, an
18 ALJ is not required to blindly accept the subjective
19 testimony of a claimant. Rather, the ALJ has the discretion
20 to weigh the credibility of a plaintiff's testimony in light
21 of other evidence in the record. I agree with the plaintiff
22 that the recitation of plaintiff's claims is minimal and
23 there doesn't appear to be a significant reference to
24 plaintiff's limiting hearing testimony. I also agree with
25 the Commissioner, that the plaintiff in this case has serious

1 credibility issues, and so I'm not, I'm not placing
2 reliance -- in vacating the decision, not placing reliance on
3 the subjective or credibility analysis. I am, however,
4 relying on the failure of the administrative law judge to
5 properly weigh the opinions of Dr. Raju, Dr. Chmielewski, and
6 Dr. Santoro.

7 So in the end, I am unable to conclude that the
8 resulting determination is supported by substantial evidence.
9 I will grant judgment on the pleadings to the plaintiff,
10 vacating the Commissioner's determination and remanding for
11 further consideration the relevant evidence without a
12 directed finding of disability because I am unable to
13 conclude, notwithstanding the fact that this case has been --
14 that the application has been pending for four years, I am
15 unable to conclude that there is such persuasive proof of
16 disability that I should remand solely for calculation of
17 benefits so I will remand without a directed finding of
18 disability.

19 Again, thank you both for excellent presentations,
20 please stay safe.

21 MR. BENSON: You do likewise, thank you very much,
22 Judge.

23 MS. ESTELLE: Take care, everyone.

24 (Proceedings adjourned, 2:53 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
United States District Court for the Northern
District of New York, DO HEREBY CERTIFY that
pursuant to Section 753, Title 28, United States
Code, that the foregoing is a true and correct
transcript of the stenographically reported
proceedings held in the above-entitled matter and
that the transcript page format is in conformance
with the regulations of the Judicial Conference of
the United States.

Dated this 10th day of September, 2020.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter